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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMIE YANG,

Defendant and Appellant.

G042310

(Super. Ct. No. 02HF0816)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed as modified.

Paul R. Ward, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jamie Yang was convicted of, inter alia, causing bodily injury while driving under the influence of alcohol and two counts of false personation. He contends his convictions were tainted by instructional error and, at most, he should have been convicted of only one count of false personation. Although we reject these claims, we do agree with appellant that he is entitled to an additional 34 days of presentence conduct credit. We will modify the judgment to reflect that entitlement and affirm in all other respects.

FACTS

Jason Loggins was driving on Jeffrey Road when appellant crashed into him from behind in his pickup truck. At the time, appellant was going about 70 m.p.h., he was under the influence of alcohol, and his driver's license was suspended. Both Loggins and his passenger were seriously injured in the crash. Appellant told police his name was Song Chin Yang, which is actually his brother's name. And, he used the name "S. Yang" in signing an agreement under which he was released on his own recognizance.

Three months later, appellant was pulled over by the police for erratic driving. Again, he identified himself as his brother, and again, his blood-alcohol level was well over the legal limit.

I

Appellant contends his conviction for causing injury while driving under the influence of alcohol must be reversed due to instructional error. We disagree.

Pursuant to Vehicle Code section 23153, subdivision (a), "It is unlawful for any person, while under the influence of any alcoholic beverage . . . to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver." The prosecution proceeded under the theory appellant neglected a legal duty in causing the collision which injured Loggins and his passenger. More specifically,

the prosecutor alleged that by failing to slow down or stop before the crash, appellant failed to maintain proper control over his vehicle, which was a dereliction of his legal duty to exercise reasonable care on the roadway.

Appellant argues that, in instructing the jury, the court failed to identify the particular act or acts that formed the basis for the prosecution's neglect of duty theory. However, the court told the jurors, "The People allege that the defendant failed to perform the following legal duties while driving the vehicle: the duty to exercise ordinary care at all times and to maintain proper control of the vehicle. [¶] You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one duty." The court also instructed, "Using ordinary care means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she fails to do something that a reasonably careful person would do in the same situation."

It is well established that ordinary negligence will suffice to prove the neglect of duty element in Vehicle Code section 23153, subdivision (a) and that no violation of any particular statute need be shown. (Veh. Code, § 23153, subd. (c); *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669.) Here, the court not only identified appellant's failure to exercise ordinary care as the basis for the prosecution's neglect of duty theory, it also identified appellant's failure to maintain proper control of his vehicle, which was the specific theory of negligence on which the People relied. By instructing the jury in this fashion, the court fulfilled its duty to properly instruct the jury on the prosecution's theory of the case.

Appellant also contends the court's instructions allowed the jury to find he was negligent simply because he drove while he was under the influence of alcohol. Again, we disagree. To prove appellant violated Vehicle Code section 23153, subdivision (a), the prosecution had to prove both that he 1) caused injury while driving under the influence of alcohol; and 2) acted negligently by failing to operate his vehicle

in a reasonably prudent manner. These are separate requirements, and proof of the first cannot suffice to establish the second. (*People v. Oyaas, supra*, 173 Cal.App.3d at p. 667.)

However, appellant fears these two requirements were conflated by the court's instructions. In defining what it means to be under the influence, the court told the jury, "A person is under the influence if, as a result of drinking an alcoholic beverage, his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person using ordinary care under similar circumstances." As noted above, the court also utilized the ordinary care standard in instructing on the neglect of duty requirement. It told the jury that drivers have the legal duty to exercise ordinary care at all times and that a "person fails to exercise ordinary care if he or she fails to do something that a reasonably careful person would do in the same situation."

There can be little question that when a person drinks to the point he can no longer drive as safely as a reasonably cautious person, he fails to exercise ordinary care, as that term is defined for purposes of the neglect of duty requirement. But, the trial court was careful to instruct the jury that being under the influence of alcohol and neglecting a legal duty were separate elements of the charged offense. At no point was the jury ever told that appellant's drinking could suffice as the factual basis for a breach of that duty. To the contrary, the parties' closing arguments emphasized just the opposite.

The prosecutor was particularly adamant regarding this point. In arguing appellant's failure to maintain control of his vehicle was what caused the collision, the prosecutor stated, "Notice, I'm not saying it's caused because he was under influence. It doesn't matter whether he was or wasn't. If he's heading down the street and fails to brake, whether he's a .19, [or] a .00, he is the cause of that accident. Those injuries

occurred because the defendant failed to do that legal duty of exercising ordinary care. That's the causation here.”

In determining whether instructional error has occurred, we consider the record as a whole, including the parties' closing arguments. (*People v. Cain* (1995) 10 Cal.4th 1, 35-37; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191.) Unless there is a reasonable likelihood the jury misunderstood the challenged instructions, we must uphold the court's charge to the jury. (*Ibid.*) Considering everything the jurors were told, it is not reasonably likely they would have believed appellant's intoxication could suffice as the factual basis for the prosecution's neglect of duty theory. We therefore find no reason to disturb appellant's conviction for causing injury while driving under the influence.

II

Appellant also contends the court gave incomplete instructions on the charge of false personation. The record shows otherwise.

Penal Code section 529 provides, “Every person who falsely personates another in either his private or official capacity, and in such assumed character either: [¶] . . . [¶] 3. Does any other act, whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person”

Although the court so instructed the jury, it did not identify the “other act” appellant was alleged to have committed, above and beyond the act of falsely impersonating his brother. Appellant contends this was error, but he waived the issue by failing to raise it below: The trial court does not have a sua sponte duty to modify or supplement an instruction that, like the one at issue here, is facially correct. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142-1143.)

Appellant contends his failure to object should be excused because the court's instructions impermissibly allowed him to be convicted based solely on the fact

he gave a false name to the police. However, the court's instructions made it clear that to prove appellant was guilty of false personation, the People had to establish he 1) "falsely personated another," and 2) "in such assumed character did an act" that could work to his benefit or adversely affect the person falsely personated. And as to each alleged incident, the prosecutor identified the particular act that formed the basis for the second requirement. For the incident involving the collision with Loggins, the prosecutor relied on appellant's act of signing the form which allowed him to be released on his own recognizance. And for the subsequent incident involving erratic driving, the prosecutor relied on appellant's act of taking a breath test. Given the court's instructions and the prosecutor's argument on this issue, it is not reasonably likely the jury failed to realize the crime of false personation requires an act in addition to the mere giving of a false name. We therefore reject appellant's claim of instructional error.

III

The next issue is whether appellant was properly convicted of two counts of false personation. Although he used his brother's name on two different occasions, he argues his assumption of his brother's character was an ongoing offense that constituted but a single violation of Penal Code section 529. We cannot agree.

Appellant bases his argument on the case of *People v. Kirk* (1989) 211 Cal.App.3d 58, which considered whether Kirk's simultaneous possession of two sawed-off guns warranted two convictions under Penal Code section 12020. At the time Kirk possessed the guns, that section provided that a person who possesses "'any instrument or weapon of the kind commonly known as a . . . sawed-off shotgun . . . is guilty of a felony[.]' [Citations.]" (*People v. Kirk, supra*, 211 Cal.App.3d at p. 60.) Finding the term "any" to be ambiguous, the court construed it in Kirk's favor and determined he could only be convicted of one count of illegally possessing a sawed-off shotgun, since he possessed both of the subject guns *at the same time and place*. (*Id.* at pp. 60-65.)

Kirk is readily distinguishable because appellant falsely impersonated his brother at different times and at different locations. And on each occasion, he did an additional act that either provided him a benefit or subjected his brother to the sort of adverse consequences listed in the statute. Appellant finds it significant that on both occasions he assumed his brother's identity, as opposed to assuming the identity of two different people. But a defendant does not acquire immunity from prosecution by using the same false name over and over again. Just because appellant assumed his brother's identity on both occasions does not mean he committed only one offense. The temporal and geographic separateness of the subject incidents fully justifies his being convicted of two counts of false personation.

The separateness of the counts also defeats appellant's claim that his convictions violate the prohibition against double jeopardy. The Double Jeopardy Clause “protects against multiple punishments for the same offense.” [Citation.] [Citation.]” (*People v. Sloan* (2007) 42 Cal.4th 110, 121.) However, that protection only comes into play when the defendant is found guilty of multiple crimes arising from a “single act” (3 Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) Punishment, § 134, p. 198) “and then only when such occurs in successive proceedings . . .” (*People v. Sloan, supra*, 42 Cal.4th at p. 121, italics omitted.) Because appellant's convictions for false personation arose from two separate incidents and but one trial, they do not violate double jeopardy principles.

IV

After appellant was sentenced, the Legislature amended Penal Code section 4019 to allow defendants to earn presentence conduct credits at a greater rate than they previously could. Appellant contends the amendment should be applied retroactively to his case, and we agree.

Appellant was sentenced on June 26, 2009. At that time, Penal Code section 4019 allowed defendants to earn presentence conduct credit at the rate of two

days for every four days in custody. (Former Pen. Code, § 4019.) However, the Legislature amended the statute effective January 25, 2010, to allow defendants to earn presentence conduct credit at the rate of two days for every two days in custody. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) The amendment does not state whether it is to be applied retroactively.

Generally, amendatory statutes are presumed to operate prospectively unless they contain an express declaration to the contrary. (Pen. Code, § 3.) But in *In re Estrada* (1965) 63 Cal.2d 740, the Supreme Court created an exception to this rule for cases in which the subject statute mitigates punishment. (*Id.* at p. 748.) In that situation, the court explained, “It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply.” (*Id.* at p. 745.)

Courts have traditionally deemed legislative enactments that increase the amount of credits a defendant may accrue as statutes that mitigate punishment for purposes of the *Estrada* rule. (See, e.g., *People v. Doganiere* (1978) 86 Cal.App.3d 237 [statute involving conduct credits]; *People v. Hunter* (1977) 68 Cal.App.3d 389 [statute involving custody credits].) Following this tradition, the majority of courts that have considered the issue have determined the recent amendment to Penal Code section 4019 falls within the *Estrada* rule, because it effectively reduces the amount of time eligible defendants will have to spend in prison. (*People v. Keating* (June 7, 2010, B210240) ___ Cal.App.4th ___; *People v. House* (2010) 183 Cal.App.4th 1049; *People v. Landon* (2010) 183 Cal.App.4th 1096; *People v. Delgado* (2010) 184 Cal.App.4th 271; *People v. Norton* (2010) 184 Cal.App.4th 408; *People v. Pelayo* (2010) 184 Cal.App.4th 481; but see *People v. Eusebio* (June 18, 2010, B216149) ___ Cal.App.4th ___; *People v. Hopkins* (2010) 184 Cal.App.4th 615; *People v. Otubuah* (2010) 184 Cal.App.4th 422.)

Although the Supreme Court has granted review of the issue and will have the final say on the matter (see *People v. Brown* (2010) 182 Cal.App.4th 1354, review

granted June 9, 2010, S181963; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808), we agree with the reasoning expressed by the courts in the majority and follow them in ruling the amendment to Penal Code section 4019 should be applied retroactively to cases pending on appeal. Pursuant to the amendment, we will modify the judgment to increase appellant's presentence conduct award from 32 days to 66 days, based on his 66 days of actual custody.

DISPOSITION

The judgment is modified to award appellant 66 days of presentence conduct credit pursuant to Penal Code section 4019, for a total presentence credit award of 132 days. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.